No. 80-1059

In The

Supreme Court of the United States

October Term, 1980

LESLIE H. ALLOTT, JR.,

Petitioner,

v.

RAYMOND SICINSKI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in refusing to entertain petitioner's "motion for leave to file amended complaint," where final judgment had been entered dismissing the action and where no motion to alter or amend the judgment pursuant to F.R.C.P. 59(e) was served within 10 days.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents, Raymond Sicinski, et al., respectfully request that this court deny the petition for writ of certiorari filed on December 22, 1980.

This joint brief is filed on behalf of all respondents in this court with the exception of the Illinois Attorney Registration and Disciplinary Commission.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

PETITIONER FAILED TO SERVE A MOTION TO VACATE OR AMEND THE JUDGMENT OF DISMISSAL WITHIN 10 DAYS OF THE ENTRY OF JUDGMENT, AS REQUIRED PURSUANT TO F.R.C.P. 59(e); HENCE, THE COURT OF APPEALS ACTED CORRECTLY IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ENTERTAIN PETITIONER'S "MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT."

Petitioner's brief to this court sets forth no important procedural, substantive, or constitutional question which would merit review by this court. In essence, petitioner asks this court to relieve him of the consequences of his own negligence in failing to file a motion to vacate the judgment of dismissal within 10 days of the entry of judgment, as required pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. As no important question of law has been raised by the petitioner, the petition for writ of certiorari should be summarily denied.

The record in this case shows that on September 28, 1979, the district court dismissed plaintiff's complaint in its entirety and with prejudice. On the same date, the district court filed a "judgment on decision by the court" with the clerk of the District Court, on form 32, as authorized under Rule 84 of the Federal Rules of Civil Procedure.

Final judgment thus having been entered of record, petitioner had 10 days within which to serve his motion to alter or amend the judgment and seek leave to file his

amended complaint, pursuant to F.R.C.P. 59(e). However, no such motion was filed or served upon defendants within that time.

As the Court of Appeals held, once a judgment of dismissal has been entered by the court, the judgment must be reopened or vacated before an amendment to the complaint will be allowed. *Markert v. Swift & Co.*, 173 F.2d 517, 519 (2nd Cir. 1949); *Chrysler Corp. v. Lakeshore Commercial Finance Corp.*, 66 F.R.D. 607 (E.D. Wis., 1975); *Republic of China v. National City Bank of New York*, 14 F.R.D. 186 (S.D.N.Y., 1953); see *Parks v. Mr. Ford*, 68 F.R.D. 305 (E.D. Pa., 1975); 6A Moore, *Federal Practice*, sec. 59.12(1), p. 59-247; Wright and Miller, *Federal Practice and Procedure*, secs. 2804 and 2817. As provided in Rule 59(e) of the Federal Rules of Civil Procedure, a motion to vacate the judgment *must* be served within ten days of the entry of such judgment. Under Rule 6(b) of the Federal Rules, the district court has no discretion to extend the period within which a Rule 59(e) motion may be made. *Motteller v. J.A. Jones Construction Co.*, 447 F.2d 954, 955 (7th Cir. 1971). As the petitioner failed to file any such motion to vacate the judgment within the statutorily prescribed time period, the trial court necessarily acted correctly in denying leave to file an amended complaint.

Throughout his brief to this court, the petitioner maintains that he had an absolute right to file an amended complaint. This is incorrect because judgment had already been entered in favor of all defendants by the district court. In none of the cases decided by the Seventh Circuit cited by petitioner for this proposition had a judgment order been entered before a motion to file an amended complaint had been made. In *Fuhrer v.*

Fuhrer, 292 F.2d 140 (7th Cir. 1961) dismissal had been granted, but the court had specifically allowed leave to amend. In *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957), the court relied heavily on the fact that the dismissal of plaintiff's complaint was made without notice to the plaintiff and under circumstances such that the plaintiff could not respond to calling of the case for trial. In *LaBatt v. Twomey*, 513 F.2d 641 (7th Cir. 1975), an amended complaint had in fact been filed by the plaintiffs before summary judgment had been granted on the original complaint; this amended complaint had apparently been overlooked or even ignored by the district court when it granted summary judgment in the defendants' favor on the original complaint. The Seventh Circuit, first noting the general rule that " * * * the allegations of the amended complaint superceded those of the original complaint" filed in the case (513 F.2d at 651), found that numerous issues of fact were raised by the allegations contained in the verified amended complaint, and accordingly reversed and remanded for trial.

The decisions from circuit courts of appeal other than the Seventh Circuit which are cited and relied upon by the petitioner in his brief to this court offer no assistance to his argument that petitioner had an absolute right to file an amended complaint. In *Ohio Casualty & Ins. Co. v. Farmers Bank of Clay, Kentucky*, 178 F.2d 570 (6th Cir. 1949), *Dowdy v. Proctor & Gamble Manuf. Co.*, 267 F.2d 827 (5th Cir. 1959), *Breier v. Northern California Bowling Proprietors' Ass'n.*, 316 F.2d 787 (9th Cir. 1963), and *Scott v. Eversole Mortuary*, 522 F.2d 1110 (9th Cir. 1975), orders had been entered dismissing the complaint, but final judgment had not been entered at the time of dismissal, as is true in the case at bar. In fact, in *Breier v. Northern California*

Bowling Proprietors Ass'n., 316 F.2d at 789, fn.1, the court specifically noted that:

> The entry of *judgment* dismissing the *action* has been held to terminate the right to amend without leave. *Kelly v. Delaware River Joint Comm'n.*, 187 F.2d 93, 94-95 (3rd Cir. 1951); *Feddersen Motors Inc. v. Ward*, 180 F.2d 519, 523 (10th Cir. 1950); *United States v. Newbury Mfg. Co.*, 123 F.2d 453, 454 (1st Cir. 1941). See also *Clardy v. Duke University*, 299 F.2d 368, 369 (4th Cir. 1962).

In short, the petitioner has raised no issue of law which would require the attention of this court, and the respondents therefore request that the petition for writ of certiorari be denied.

II.

ASSUMING, *ARGUENDO*, THAT THE DISTRICT COURT HAD THE DISCRETIONARY AUTHORITY TO ALLOW PETITIONER TO AMEND HIS COMPLAINT, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER SUCH LEAVE.

Even if it is assumed that the district court had the discretionary power to allow petitioner leave to file an amended complaint, the trial court did not abuse its discretion in the case at bar.

Rule 15(a) allows a party to amend his pleading. The decision of the district judge as to whether to allow an amended pleading lies within his sound discretion and is reviewable only for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330, 91 S.Ct. 795, 28 L. Ed. 2d 77 (1971). In making the determination as to whether an abuse of discretion occurred the reviewing court must view the case in the posture in which the trial court acted in ruling on the

motion to amend. *Beeck v. Aquaslide N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977). Consequently, the issue before the circuit court was whether the district court abused its discretion in denying petitioner's motion to file an amended complaint.

The record reveals no such abuse of discretion in the case at bar. First, one of the criteria in deciding whether to allow an amended complaint is whether the amended pleading will cure the deficiencies of the complaint which was dismissed. The amended pleading must be able to withstand a motion to dismiss. *Bernstein v. National Liberty Intern. Corp.*, 407 F.Supp. 709, 715 (E.D. Pa., 1976) and cases cited therein. It is not an abuse of discretion to deny leave to amend where the amended complaint alleges no new facts which would cure previous deficiencies. *Stebbins v. Weaver*, 537 F.2d 939, 941 (7th Cir. 1976); *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965); See also *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972).

As the district court noted, petitioner failed to submit the proposed amended complaint and thus, the trial judge was prevented from making a determination as to whether the amended complaint would have cured the deficiencies of the original complaint. (Appendix at pp. 24a-25a.)

Moreover, it is well settled that leave to amend should not be granted where it is clear that plaintiff would not be entitled to any relief under any statement of the facts which could be proved in support of his claim. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977); *Sarfaty v. Nowak*, 369 F.2d 256, 259 (7th Cir. 1966); *Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir. 1961). This court has recognized that one of the criteria in determining whether an amended complaint should

be filed is whether such an amendment is a futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Allowing the petitioner leave to file an amended complaint would have been futile because petitioner cannot plead facts establishing federal jurisdiction over any of the respondents. Simply put, petitioner cannot state a cause of action against any of the defendants-respondents under the theories set forth in the original complaint, no matter what additional facts are alleged. (See Appendix, pp. 32a-61a.)

The district court, therefore, did not err in refusing to grant petitioner leave to file an amended complaint, and the appellate court did not err in affirming this action by the district court.

CONCLUSION

The respondents, Raymond Sicinski, et al., respectfully request this Honorable Court to deny the petition for writ of certiorari filed by the petitioner, Leslie H. Allott, Sr., herein.

Respectfully submitted,

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